

SUPPLEMENT TO THE DECISION DOCUMENT **FOR NATIONWIDE PERMIT 44**

This document is a supplement to the national decision document for Nationwide Permit (NWP) 44, and addresses the regional modifications and conditions for this NWP. The South Pacific Division Engineer has considered the potential cumulative adverse effects on the aquatic environment that could result from the use of this NWP, including the need for additional modifications of this NWP by the establishment of regional conditions to ensure those cumulative adverse effects on the aquatic environment are minimal. The Division Engineer has also considered the exclusion of this NWP from certain geographic areas or specific waterbodies. These regional conditions are necessary to address important regional issues relating to the aquatic environment. These regional issues are identified in this document. These regional conditions are being required to ensure this NWP authorizes activities that result in no more than minimal individual or cumulative adverse effects on the aquatic environment. This document also identifies regionally important high-value waters and other geographic areas in which this NWP should be regionally conditioned or excluded from NWP eligibility as described below, to ensure further that the NWP does not authorize activities that may exceed the minimal adverse effects threshold.

1. **Background:** On July 1, 1998, the Corps of Engineers (Corps) published its proposal in the Federal Register to issue six new NWPs and modify six existing NWPs to replace NWP 26. The Corps published a supplemental Federal Register notice on October 14, 1998, announcing the withdrawal of one of NWPs and soliciting comments on proposed constraints of the NWPs within the 100-year floodplain, designated critical resource waters, and impaired waters. On March 9, 2000, the Corps published a Federal Register notice containing the final text of the NWPs and general conditions.

The Los Angeles District (District) issued public notices on August 3, 1998 and April 21, 2000 to solicit comments on proposed regional conditions for these NWPs. In addition, Regulatory personnel conducted public meetings in Los Angeles and Phoenix on September 9, 1998 and September 30, 1998, respectively. The comments received in response to these public notices and meetings are summarized below.

2. **Consideration of Public Comments:**

(a) **General Comments:** The District received the following general comments on NWP 44 and associated issues:

(1) The U.S. Fish and Wildlife Service (USFWS), Carlsbad Field Office, National Marine Fisheries Service (NMFS) and environmental groups requested the notification requirements for NWPs be expanded. Specifically, the USFWS requested that all NWPs include notification to both the Corps and the resource agencies. Furthermore, the USFWS recommended that Standard Local Operating Procedures for Endangered Species (SLOPES) be developed for the Nationwide Permit program to ensure compliance with the Endangered Species Act (ESA). The NMFS requested the Corps to require notification for all projects affecting waters of the U.S. within coastal streams from the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/ Monterey County boundary. In contrast, one commenter requested that the notification requirement be increased to the national standard of 0.33 acre of waters of the U.S.

Response: The Final Notice of Issuance and Modification of Nationwide Permits published in the March 9, 2000 Federal Register requires notification for any level of impact proposed for authorization under NWP 44. In addition, the Corps has initiated coordination with the USFWS and NMFS to develop SLOPES for the Los Angeles District to better ensure compliance with the Endangered Species Act. The Los Angeles District could require

notification for all projects that require authorization under NWP 44, and the District could forward these notifications to the resource agencies. However, requiring notification for all jurisdictional mining projects regardless of their potential impact to resources, not just those in special aquatic sites and in waters with relatively high physical and biological functions, would increase the workload for the Los Angeles District without commensurate significant benefits to the aquatic ecosystem. With the proposed constraints on NWP 44, the Los Angeles District has identified the resources and watersheds that warrant additional scrutiny. Although the Corps has not adopted the proposed notification requirements suggested by NMFS, we have included a regional condition that requires that all road crossings minimize impacts to stream channel morphology.

Regarding increasing the notification threshold to 0.33 acres, the Corps believes that an increased threshold of 0.33 acre for notification would not provide adequate protection to the aquatic environment. The blanket notification requirement allows the District Engineer to review proposed mining and reclamation plans to ensure impacts to waters of the United States will not exceed the acreage thresholds of NWP 44 and that the proposed mining project will be in compliance with the terms and conditions of the NWP.

(2) In several letters, local flood control agencies indicated that NWPs and the associated regional conditions did not consider public safety from flood events. Furthermore, they indicated that the additional notification requirements and increased constraints could result in more than minimal impacts resulting from flood hazards. The flood control agencies also indicated that NWPs and the regional conditions increased the Los Angeles District workload without adding protection to the aquatic environment. Overall, the flood control agencies indicated that the proposed changes to the NWP program would increase regulation of projects with minimal impacts and jeopardize public safety.

Response: With NWPs and the associated regional conditions, flood control projects in areas with relatively low physical and biological functions can proceed without notification to the Corps. However, to ensure minimal impacts to the aquatic ecosystem, the Corps must place additional constraints on activities that affect special aquatic sites, sensitive watersheds and jurisdictional vernal pools. With the proposed changes to the NWP program, the Corps has balanced the need for both flood safety and environmental protection. With the proposed regional conditions, there would likely be only a minor increase in workload, but would result in substantial benefits to the aquatic environment. As a result, the Corps respectfully disagrees with the commenter and believes a proper balance between two important issues has been established with the regional conditions.

(3) As part of the proposed regional conditions, several environmental groups stated a need for regional standards to be developed for wetland hydrology and hydric soils in southern California. In addition, a commenter indicated there needs to be a standard definition for what constitutes a water of the U.S., specifically for ephemeral washes.

Response: The Corps concurs that regional standards for jurisdictional ephemeral streams, wetland hydrology and hydric soils would be a very useful tool for future wetland delineations. However, it would not be appropriate to develop these standards as part of the regional conditions for the NWPs. Furthermore, 33 CFR Part 328 and the final version of the NWPs (FR 65:47 - March 9, 2000) provide a definition for what constitutes a jurisdictional water of the U.S., including intermittent and ephemeral streams.

(4) Several environmental groups indicated they supported the proposal to include upland buffers as part of mitigation plans to offset impacts to waters of the U.S. They recommended that wetland buffers should be required to retain existing permeable area for high water/runoff flows for a minimum 100-year flood, and maintenance of all existing functions for these areas including: pollution capture and retention, filtration, groundwater recharge, flood and erosion control, and corridors that allow the movement of native animals between the wetland and nearby upland habitats.

Response: Comment noted.

(5) A commenter indicated that all discharges of dredged or fill material in wetlands should be precluded under the proposed NWP program. With the amount of historic loss of wetland resources, the commenter indicated that only wetland enhancement and restoration projects should be authorized under the proposed NWPs.

Response: The District considered an alternative regional condition would prohibit the use of the NWPs in all special aquatic sites in the Los Angeles District. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project which would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to special aquatic sites. However, NWP 44 could only be used to impact a maximum of 0.5 acres of waters of the U.S. and any wetland impacts must be mitigated. In addition, NWP 44 does not allow mining in any tidal wetlands. Furthermore, the new General Conditions for the NWP program would provide further limitations on projects authorized under NWP 44. To ensure minimal impacts to sensitive aquatic resources, the Los Angeles District has precluded discharges under NWP 44 in all jurisdictional vernal pools, and special aquatic sites in Arizona and the desert regions of California. With the above regional conditions, the Los Angeles District has identified specific geographic areas and resource types that warrant additional protection without adversely increasing our workload. In contrast, a regional condition that precluded all discharges in special aquatic sites would unnecessarily increase our workload to review small-scale impacts in areas that exhibit lower physical and biological functions. This modification would not be practicable in light of the District's workload and would only provide relatively minor environmental benefits to the aquatic ecosystem.

(6) Several commenters indicated that the proposed NWPs would result in more than minimal cumulative impacts in the Santa Margarita River watershed in Riverside and San Diego counties. As evidence for the cumulative impacts, they referenced Dr. Eric Stein's study of the impact of the Section 404 Permit Program on the above watershed.

Response: The Los Angeles District recognizes both the level of impacts to the Santa Margarita River watershed and the evidence provided by Dr. Stein in his research. In response to the above, the District proposes to take discretionary authority over NWPs 39, 42 and 43 that authorize new fills in perennial and intermittent watercourses in the Murrieta Creek and Temecula Creek watersheds. In addition, this discretionary authority is extended to jurisdictional ephemeral watercourses in these watersheds if the project impacts more than 0.1 acre of the ephemeral drainage. By taking discretionary authority in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, or other unauthorized activities, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA, and protection of special aquatic sites. A proposed regional condition for the proposed nationwide permits that precluded all discharges of fill material in the entire Santa Margarita

River watershed would unnecessarily increase our workload to review small-scale impacts in portions of the watershed that do not exhibit the same level of cumulative impacts. This preclusion would also unnecessarily burden the regulated community with standard Individual Permit review in every case. As a result, elimination of all NWPs in the Santa Margarita River watershed would not be justifiable in light of the District's workload, the burden to the regulated public, and the minor environmental benefits to waters of the U.S. in the Santa Margarita River watershed.

(7) NMFS commented that the impact acreage thresholds do not ensure protection of the aquatic environment nor do they further the recovery of listed species as they are insensitive to small, discrete or isolated habitats necessary for ontogeny and survival of listed species. NMFS believes the acreage thresholds have no biological or ecological basis and are inconsistent with due process. The Corps should require notification, compensatory mitigation, or elimination of the impact acreage thresholds. NMFS also requested that in coastal streams from the southern reach of the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary that no mining activity be authorized by NWP 44 in special aquatic sites and areas where spawning or rearing of federally listed species are known or believed to occur.

Response: Los Angeles District believes the 0.5-acre threshold provides adequate protection of aquatic resources because mining projects of such small size would tend to be for small localized needs and would tend to preclude most commercial activities. This NWP, with restrictions, would allow small needs to be met potentially without the need to expend considerable additional expense to bring material to a jobsite from commercial providers at some distance away from the jobsite. Notification requirements inherent to the NWP allow the Corps to determine if a particular action may affect resources of higher values. To further reduce or eliminate this threshold would unnecessarily increase the District's workload without providing meaningful increases in protection of aquatic resources or listed species. Los Angeles District believes a more focused approach is appropriate, whereby specific sensitive watersheds and habitat types, such as jurisdictional vernal pools or special aquatic sites in the desert regions of Arizona and southern California, have been excluded from authorization under the Nationwide Permit program. Regarding NMFS' request to exclude NWP 44 from the coastal watersheds cited above, Los Angeles District has adopted a regional condition that would require all road crossings to employ a bridge design that ensures passage and/or spawning of steelhead (*Oncorhynchus mykiss*) is not hindered. This also applies to access roads for mining activities. Other impacts resulting from mining activities within this geographic area must also comply with General Condition 11, which requires notification to the Corps if any listed species or critical habitat may be affected by a proposed action. This would ensure consultation with NMFS or USFWS is conducted to address potential impacts to the species.

(8) One commenter expressed opposition to the proposal to exclude use of NWP 44 to authorize hard rock/mineral mining in ephemeral streams. Should this restriction be adopted they requested the development of a regional general permit that would authorize mining in ephemeral streams in Arizona.

Response: Los Angeles District is no longer considering restrictions on NWP 44 in ephemeral watercourses. The District believes that the constraints inherent to the NWP, as well as regional conditions placed on it by the District, and the ability of the Corps to consult with the USFWS and NMFS when listed species may be affected, suitably address potential concerns this NWP may raise.

(9) The Environmental Protection Agency (EPA) commented they believe NWP 44 will cause or contribute to significant degradation of waters within Region IX and should be revoked. As an alternative, EPA suggested the use of regional general permits or Letters of Permission, where appropriate, for certain types of mining activities in various subareas of Region IX.

EPA stated they believe 80 percent of the mining activities within Region IX that are currently below the headwaters could potentially be permitted under NWP 44. In particular, they highlighted two geographic regions where mining activities currently require an individual permit for below headwaters impacts. The first of these includes small- to mid-sized perennial streams along California's northwest and central coast and those within the Central Valley that support runs of anadromous salmonids and other sensitive native fish. The second region includes streams within the arid southwestern portions of region IX (southern California, Nevada and Arizona). In the second case, EPA believes that allowing additional impacts in areas that are already severely impacted is unacceptable without an environmental assessment or full public input as would be determined in the individual permit process.

EPA also disagreed with the assumption that support activities are not appropriate for lower perennial streams but are appropriate for low flow systems. They further commented that the term "lower perennial" was not clearly defined and could be applied to all perennial streams. EPA further cited the example of the Verde River, a lower perennial stream in Arizona where upland alternatives have been identified, following completion of several enforcement actions and an Advanced Identification (ADID) process, as a situation where implementation of NWP 44 would act as a disincentive to avoid in-channel aggregate mining.

EPA expressed the concern there are no conditions to restrict multiple aggregate operators within a relatively short reach of channel from each obtaining this NWP, potentially resulting significant cumulative impacts to the aquatic environment. They cited the Salt River as an example of multiple operations within a relatively short reach of channel that can produce significant adverse hydrologic effects downstream.

EPA also commented that various geochemical factors associated with hard rock mining can result in significant degradation of groundwater and surface water resources and that the 200-foot setback for beneficiation is not adequate to avoid such impacts. EPA indicated it is likely multiple operations using NWP 44 for hard rock mining will likely cause significant losses to stream acreage and quality, and that only the IP process can ensure an operator will adequately avoid and minimize impacts to waters.

Finally, EPA commented that the regional condition prohibiting the use of NWP 44 in wetlands would be difficult to apply in this geographic region given that many of these resources occur as a dynamic and complex mosaic of wetlands and non-wetland waters within the ordinary high water mark of a given channel.

Response: Los Angeles District believes the additional limitations to NWP 44 imposed in the March 9, 2000 Federal Register notice, along with regional conditions, will ensure authorization of projects under this NWP will not have more than minimal adverse impacts to the aquatic environment, both individually and cumulatively. Furthermore, NWP 44 requires a PCN that will be reviewed for potential adverse impacts.

Los Angeles District believes implementation of NWP 44 as currently written would effectively allow authorization of only small mining operations, although some of these could occur below headwaters. We do not agree the NWP as currently written would allow most of the current mining operations to continue under the NWP, but would require analysis under the individual permit process because very few such operations within Los Angeles District impact less than 0.5 acre of waters. With regard to the specific geographic areas cited by EPA that are

within Los Angeles District, the regional conditions which have been adopted would provide adequate protection of aquatic habitat.

The definition of “lower perennial” stream has been clarified in the last paragraph of the NWP 44 regulation published in the March 9, 2000 Federal Register. Los Angeles District does not believe circumstances such as those cited for the Verde River would be addressed differently with the implementation of NWP 44 as it does not undermine EPA’s or the Corps’ enforcement ability, nor the means to address greater than minimal cumulative impacts given the notification requirement and acreage limitations imposed. Additional discussion may be found in the March 9, 2000 Federal Register.

Multiple aggregate operations within a given area are addressed through the NWP regulations on single and complete projects. The blanket notification requirement will provide the means to determine if cumulative impacts to the aquatic environment exceed the minimal impact threshold.

Los Angeles District believes the 200-foot setback for beneficiation activities is adequate to protect water quality. Processing of material away from jurisdictional waters of the U.S. as intended by the NWP should not result in substantial adverse effects on water quality, but if the proposed project is in an area familiar to the Regulatory project manager, the notification requirement will provide the means to determine if individual or cumulative impacts to the aquatic environment may exceed the minimal impact threshold.

Contrary to our earlier public notice, no regional condition for a blanket prohibition on use of NWP 44 in special aquatic sites is proposed by Los Angeles District. Rather, the Los Angeles District has determined a more focused approach is warranted, particularly in light of the reduction in the acreage threshold to 0.5 acre in the March 9, 2000 Federal Register. Accordingly, Los Angeles District has adopted a regional condition that would prohibit use of NWP 44 (among others) in special aquatic sites in the State of Arizona and in the Mojave and Sonoran (Colorado) desert regions of southern California. The condition would apply to any regulated activity in a special aquatic site within these regions. Additionally, discretionary authority will be exercised in specific watersheds that have experienced more than minimal cumulative impacts or support substantial aquatic resources that exhibit high physical and biological functions.

(10) One commenter expressed concern that regional differences among the four districts in the South Pacific Division are not reflected in the regional conditions and that the Districts do not clearly identify what these regional differences are in determining appropriate regional conditions. They further commented that the Los Angeles District’s proposal to exclude NWP 44 from special aquatic sites does not have a scientific basis and does not take into account the widely varied nature of special aquatic sites that in some cases can be enhanced by appropriate types of aggregate extraction. They concluded the proposed regional conditions would render NWP 44 virtually useless, forcing aggregate extraction operations to rely solely on IPs. They also pointed out these restrictions may adversely affect anadromous fish by allowing sediments to build up and block fish passage.

Response: The Los Angeles District believes the regional conditions accurately reflect the particular aquatic resource issues and concerns within the District. Whether the conditions established for Los Angeles District jibe with those of the other three Districts in South Pacific Division is immaterial because of the varied conditions found within and amongst the Districts. It is unreasonable to presume that *regional* conditions deemed appropriate for the northern coastal California river systems in San Francisco District have any relevance to conditions proposed by the Albuquerque District in western Texas. The decision to develop these regional

conditions was not made arbitrarily but was based on our regulatory experience in this region, the documented decline in historic wetland resources, and research by others concerning impacts to our aquatic resources. For example, Dr. Eric Stein's research on the impacts of past 404 permits on the Santa Margarita River watershed (which includes aggregate mining operations) clearly indicates the need for stricter regional conditions in order to ensure protection of these important aquatic resources. Los Angeles District believes research such as Dr. Stein's and that conducted by Dr. Joy Zedler for estuarine systems, as well as our experience in regulating these resources, provides adequate justification for these regional conditions.

NWP 44 will be available for use by aggregate operations that are able to operate within the constraints of the NWP and these regional conditions. It should not be presumed that the NWPs are intended to allow authorization of all mining projects, but rather that mining projects should avoid and minimize their impacts with the intent of utilizing an available general permit. It is the belief of the Corps that aggregate mining operations that are unable to do so would have more than minimal impacts on the aquatic environment. Sediment accumulations that may potentially disrupt fish passage can easily be addressed by limited maintenance activities to clear blocked culverts or remove bars, for example. However, a natural accumulation of sediment would not likely result in any significant blockage of fish migration beyond the short term because the water probably has a way through or around such accumulation, and would then be available for fish passage. Instream aggregate mining operations are more likely to create impediments to fish passage by diverting flows, excavating pits, and causing changes to the natural erosion and sedimentation regimes.

(11) Several commenters opposed establishment of regional conditions for the replacement nationwide permits issued in the March 9, 2000 Federal Register notice (65 FR 12818) and requested that they be withdrawn from further consideration. Several commenters requested that a public hearing be held to allow them to personally voice their opposition. Several commenters requested that Los Angeles District extend the comment period for the April 21, 2000 public notice by at least two weeks. Several commenters requested that prior to any public hearing on the regional conditions, the Corps should provide written responses to the comments received during the written comment period. Several commenters indicated that regional conditions on the nationwide permits would be unnecessarily complex and would duplicate other existing regulatory programs, such as the reviews conducted by the U.S. Fish and Wildlife Service (USFWS), the National Marine Fisheries Service (NMFS), the State Water Resources Control Board (SWRCB) and its member Regional Water Quality Control Boards (RWQCB), the Arizona Department of Environmental Quality (ADEQ) in Arizona, the California Coastal Commission (CCC), and the State Historic Preservation Offices (SHPO). This commenter requested that findings of these agencies' reviews of the nationwide permit program in the District be addressed in a separate public notice and circulated for public comment.

Response: General permits, such as the NWPs and regional general permits established by the District or Division Engineer, can only be established if in conformance with Section 404(e). Section 404(e) enables the establishment of general permits only if they are for a relatively specific type of activity and if they have minimal adverse impacts on an individual and cumulative basis. It is unreasonable to presume that any general permit has uniform applicability across the breadth of the United States from Alaska to Florida and from Maine to Hawaii. It is equally unreasonable to presume that any general permit demonstrates the same relative level of impact to aquatic resources across the breadth of the U.S. Hence, the development of regional conditions to address the local conditions that may be affected by the implementation of the general permit.

The Los Angeles District conducted public meetings on September 9 and September 20, 1998 specifically to receive comments on proposed regional conditions. Those comments were given full consideration in subsequent public notices issued after publication of draft NWP in the Federal Register. Comments provided at the public meetings were essentially oral recitations of the written comments provided for submittal to the record.

The comment period for the April 21, 2000 public notice was extended to allow ample opportunity for the provision of comments. However, an extension was given to all who requested it, and comments received after the close of the comment period were also accepted and are part of the public record. Responses to written comments received were not prepared and distributed to the commenters. Responses to comments are provided in this document as part of the Corps' environmental assessment of the potential effect on the human environment of the NWPs and associated regional conditions. This is the appropriate avenue to follow under the National Environmental Policy Act (NEPA) and Section 404 of the Clean Water Act (CWA).

On a cursory level, it may appear that the Corps' regulatory responsibilities under Section 404 of the Clean Water Act, Section 10 of the River and Harbor Act approved March 3, 1899, and Section 103 of the Marine Protection, Research and Sanctuaries Act of 1972 are simply duplicating the reviews conducted by other State and Federal agencies. However, each agency has specific responsibilities as directed by State or Federal statute, which cannot be delegated to another agency without considerable development of procedures, which may also require additional rulemaking and/or modifications of statutes. For instance, under Section 404 of the CWA, the Corps of Engineers was given the responsibility to regulate the discharge of dredged or fill material into waters of the U.S. by Congress. This responsibility cannot be easily delegated to another agency without their agreement and substantial additional development of procedures, not to mention funding of programs and liability issues. For these reasons, each agency is better equipped to address its responsibilities for issues related to aquatic resources at this time. We also disagree with the statement that the various agencies' responsibilities are duplicated unnecessarily. The USFWS and NMFS oversee coastal and inland wildlife resource issues; the SWRCB, ADEQ and RWQCBs address state water quality issues as directed under Section 401 of the CWA; the CCC addresses compliance with the Coastal Zone Management Act, and the SHPO addresses potential effects of a federal action on cultural resources as directed by the National Historic Preservation Act. The Corps, as a federal action agency, must comply with all applicable federal, state and local statutes. To ensure such compliance, the Corps coordinates with these agencies and others. Just as the other agencies have no authority to regulate discharge of dredged or fill material, neither does the Corps have the authority to make absolutely unilateral decisions regarding issues pertaining to fish and wildlife issues, coastal zone resources, water quality compliance determinations, or mitigation for impacts to cultural resources. If duplication of effort is perceived, it is simply perception and not substance. The Corps will not issue an additional public notice to simply state the findings of other agencies' reviews of the NWP program. Their comments pertaining to the issuance of the new and modified NWPs and the District's regional conditions are summarized in this document, and are followed by the District's response.

(12) One commenter stated the District couldn't establish regional conditions by public notice because such conditions must be adopted in conformance with the Administrative Procedures Act (APA). This commenter noted that public notices consist of sending information to those on the District's mailing lists or posting such notices on the District's webpage. This commenter stated that such notices do not comply with the federal requirements for adopting rules under the APA. This commenter stated the public notices issued to date do not adequately explain why

the Corps decided to impose additional requirements beyond those in the proposed NWP. This commenter stated there are no compelling reasons to add regional conditions to the NWPs and that they would create unnecessary work and delay.

Response: Without greater specificity as to areas of discrepancy with the APA, the District must respectfully disagree with the commenter. In simple terms, the APA provides for, among other things, a means by which a federal agency proposing an action that may affect the public at large, issue notice of such action well in advance, to receive comment on the proposed action, make documents readily available for review by requesting parties, and document any final decisions made. The Corps issued several notices in the Federal Register as noted above. These notices specifically mentioned the development of regional conditions by each District to ensure the new and modified NWPs have minimal impacts as required the Section 404(e) of the CWA. The District followed this direction utilizing procedures already established in the implementing regulations for the Regulatory Program and issued three public notices of proposed regional conditions in response to each of three Federal Register notices on proposed and final new and modified NWPs. The District received comments on each notice that were then accepted into the public record. Full consideration was given to all comments received, written, oral, electronic or otherwise. With each iteration of the Federal Register notices and the District's subsequent public notices, the District made new assessments as to the need for regional conditions to limit the extent of the NWP, and to address sensitive resources, habitat types, or watersheds.

- (b) Comments on Proposed Regional Condition 1: Regional Condition 1 would require bridge crossings over streams that support steelhead migration, spawning or rearing to be constructed in a manner that avoids adverse impacts to these activities. Such construction could be in the form of a span crossing or buried culverts such that passage by steelhead is unimpeded. Several commenters indicated that the regional condition would unnecessarily increase the District's workload with only minor benefits to the aquatic ecosystem. Several commenters, including NMFS and USFWS, indicated that they supported the proposed condition and provided additional areas that should be included in the condition.

Response: Bridge crossings on watercourses that support migration, spawning or rearing of southern steelhead should be designed to not impede such migration, spawning or rearing. Because projects that discharge fill material into such waters would need a permit from the Corps pursuant to Section 404 of the Clean Water Act, the Corps would have to determine whether such a discharge may affect the species or its designated critical habitat. If the Corps determines the project may affect the species or its habitat, it is obligated to consult with NMFS pursuant to Section 7 of the Endangered Species Act. This consultation would likely result in recommendations to address impediments to steelhead migration, spawning or rearing. Furthermore, general condition 4 states no activity may substantially disrupt movement of species indigenous to the waterbody, including migration, and that culverts must be installed to maintain low flow conditions. While some may think the regional condition is redundant, Los Angeles District believes this condition will greatly benefit the species while allowing the applicant a high degree of assurance his proposed project would meet minimal further constraints in most cases by better focusing the applicant's design efforts to a project more likely to achieve agency approvals. Los Angeles District also believes this condition would place virtually no additional workload on the District and is more likely to lessen workload for such projects due to designs meeting desirable parameters prior to submittal.

- (c) Comments on Proposed Regional Condition 2: Several commenters indicated that the geographic

description for the desert areas of California was vague and confusing. In addition, several commenters indicated that small projects in desert areas that include impacts to special aquatic sites could still meet the minimal impacts test. As a result, they believed that this condition was unnecessarily restrictive. In addition, several commenters questioned the scientific basis for singling out special aquatic sites in desert areas for additional restrictions. Other commenters indicated that this regional condition should be expanded to include all special aquatic sites in the Los Angeles District.

Response: For the majority of projects in the desert regions of California, it will be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above desert regions; however, the prospective applicant can contact the Los Angeles District Regulatory Branch to clarify the issue. When the regional conditions are established, the Los Angeles District should be able to provide maps that more clearly indicate the geographic boundaries of the desert areas.

This regional condition provides needed constraints for discharges of dredged or fill material in jurisdictional special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions on a local and regional basis. These aquatic areas provide important and unique habitat for threatened and endangered species, such as least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds, and other indigenous wildlife. In many cases, open water resources in desert regions are a critical resource for an entire suite of wildlife species. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems.

To ensure NWP's would have minimal impacts, both individually and cumulatively, authorization by general permit for fills in jurisdictional special aquatic sites in desert regions should be precluded in the Los Angeles District. Any proposed projects that may adversely impact this valuable desert resource would be reviewed under the Individual Permit process, which requires a rigorous alternatives analysis and public interest review. As a result, further impacts to special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure NWP's would have minimal impacts, both individually and cumulatively, to jurisdictional special aquatic sites in the desert regions of the Los Angeles District.

An alternative regional condition would prohibit the use of nationwide permits in all special aquatic sites in the Los Angeles District. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicate there could be a need for the review of any project that discharges dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure no adverse impacts to these resources. However, as discussed above, this NWP would only impact a maximum of 0.5 acre of waters of the U.S. With the inclusion of the constraints on nationwide permits (General Conditions and nationwide permit criteria) and other regional conditions, a regional condition that precluded all discharges in jurisdictional special aquatic sites would unnecessarily increase our workload to review small-scale impacts in areas that exhibit lower physical and biological functions, or where such resources occur more frequently or have relatively lesser importance for other organisms. As a result, precluding all discharges in special aquatic sites in the District would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem at the expense of an unmanageable workload.

- (d) Comments on Proposed Regional Condition 3: Several commenters indicated they supported this regional condition and stated that by requiring color photographs as part of the application, it could

provide better information to decision makers and speed up the permit process. Several commenters requested that this condition be modified to include color photographs from specific reference points that are documented on a map. However, several commenters indicated this regional condition placed an unnecessary burden on applicants and that color photographs should only be required when sensitive resources are present in the project area. Overall, these commenters believed this regional condition would unnecessarily increase the cost of an application without any real benefits to decision makers.

Response: It is the position of the Los Angeles District that color photographs can provide valuable information on the level of physical and biological functions present in a given project area. In some cases, the photographs will verify that no sensitive habitat is present, decreasing the number of site visits by the Regulatory Branch staff. We believe this condition will increase our efficiency by allowing desk assessments of affected habitat, speeding up the permit process for small projects that do not impact sensitive habitat. As a result, we believe this regional condition is a valuable tool for the Regulatory Program and, as a result, have incorporated the suggested requirement of specific reference points that are indicated on an attached map.

- (e) Comments on Regional Condition 5: Several commenters indicated that the geographic description for the Santa Monica Mountains area was vague and confusing. Several commenters indicated that small projects in desert areas that include impacts to special aquatic sites could still meet the minimal impacts test. As a result, they believed that the notification requirements were unnecessarily restrictive.

Response: For the majority of projects in the Santa Monica Mountains, it will be quite clear from the geographic description whether the regional condition applies. Initially, there may be some confusion along the margins of the above area; however, the prospective applicant may contact the Los Angeles District to clarify the issue. When the regional condition is established, the Los Angeles District should be able to provide maps that clearly indicate the geographic boundaries of the Santa Monica Mountains area.

It is the position of the Los Angeles District that any discharge of dredged or fill material in a special aquatic site warrants the review of Regulatory Branch. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates the need for compensatory mitigation to ensure no adverse impacts to special aquatic sites. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to special aquatic sites.

The jurisdictional waters of the U.S. in the Santa Monica Mountains watersheds support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including southern steelhead and tidewater goby utilize habitats in these watersheds. In addition, past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value systems. To ensure the proposed NWP would have minimal impacts, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, any further losses in this area would be compensated with mitigation and further impacts to the aquatic ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to aquatic resources in the Santa Monica Mountains watersheds.

Perennial watercourses or water bodies in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these perennial watercourses can provide important and unique habitat for

endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these perennial watercourses have degraded portions of these high value systems. To ensure the proposed NWP would have minimal impacts, both individually and cumulatively, Regulatory Branch should review every project. With this notification requirement, any further losses of this valuable desert resource would be compensated with mitigation and further impacts to the aquatic ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to perennial watercourses and water bodies in the desert regions of the Los Angeles District.

The jurisdictional waters of the U.S. in tidal areas support substantial aquatic resources, which exhibit relatively high physical and biological functions. Furthermore, a number of endangered species, including the California least tern, California brown pelican, western snowy plover and tidewater goby, utilize habitats in these areas. In addition, past construction activities in and adjacent to waters of the U.S. have degraded portions of these high value coastal systems. To ensure the proposed NWP would have minimal impacts to Essential Fish Habitat, both individually and cumulatively, every project should be reviewed by Regulatory Branch. With this notification requirement, any further losses in these coastal areas would be compensated with mitigation and further impacts to the marine ecosystem would be minimized. With this notification requirement, the Los Angeles District can ensure the proposed NWP would have minimal impacts, both individually and cumulatively, to aquatic resources in tidal areas within the Los Angeles District.

- (f) Comments on Regional Condition 6: The Los Angeles District proposed taking discretionary authority in several areas of the District to protect sensitive aquatic habitat types or watersheds. Several commenters indicated the proposed constraints on vernal pools were unnecessary considering other conservation measures in place to address this sensitive resource, or were too restrictive considering the small acreage involved with many projects that may affect vernal pools. Several commenters also questioned whether vernal pools could be adequately described considering the unique characteristics inherent to each pool. Several commenters noted the extreme loss experienced by this resource in southern California would warrant their exclusion from consideration of authorization by any general permit. The resource agencies and environmental community noted how the Santa Margarita River watershed has received a significant level of adverse impact to the various watersheds, leading to a variety of problems such as increased runoff and erosion, incision of channels, deposition of sediment leading to adverse flooding situations, etc. Conversely, several commenters noted the proposed restriction is not necessary and would adversely affect the Corps' workload and subsequent response time.

Response: Loss of vernal pool habitat in the Los Angeles District is well documented, and ranges from 95 to more than 99 percent in the southern California region indicating substantial cumulative losses of this habitat type in these areas. Vernal pools not only represent a unique type of wetland habitat, but also provide essential habitat for several endangered invertebrate and plant species. It is the position of the Los Angeles District that vernal pools in the above areas are sufficiently rare that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated and/or require site specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, the NWP would result in more than minimal impacts to special aquatic sites and endangered species in the Los Angeles District.

This regional condition also provides needed constraints for discharges of dredged or fill material associated with new structures/facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. Furthermore, these aquatic areas provide important and unique habitat for endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds and other indigenous wildlife. In addition, past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure the NWP would have minimal impacts, both individually and cumulatively, new permanent fills in special aquatic sites in the above desert regions should be precluded in the Los Angeles District. By eliminating authorization by general permit of new permanent fills in special aquatic sites in the desert, any further losses of this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure the NWP would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District.

Based on a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein, the Murrieta Creek and Temecula Creek watersheds have been affected by a large number of past Section 404 permit actions, including instream mining. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. As a result, further permanent fills in waters of the U.S. under the NWP program could result in greater than cumulative impacts to jurisdictional areas for certain types of projects in these two watersheds. By precluding authorization under NWPs 39, 42, and 43 for new permanent fills in perennial and intermittent watercourses in these two watersheds that exhibit cumulative impacts from past Section 404 permit actions, and for projects that cause the loss of more than 0.1 acres of ephemeral watercourses in these same watersheds, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs which precluded all discharges in the entire Santa Margarita River watershed would unnecessarily increase our workload to review small-scale projects in areas of the watershed that do not have substantial cumulative impacts at this time. As a result, the District's regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

In Gaviota Creek, Mission Creek, and Carpinteria Creek of Santa Barbara County, and San Luis Obispo Creek and Santa Rosa Creek of San Luis Obispo County, a substantial number of bank stabilization projects have resulted in cumulative adverse impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Although the bank stabilization projects have not resulted in the loss of a large amount of waters of the U.S., the cumulative hydrogeomorphic effects of the bank stabilization have eliminated habitat for the threatened southern steelhead that utilizes these streams. At present, there have been cumulative impacts to the above species directly resulting from the use of NWPs 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels that exhibit cumulative impacts from past Section 404 permit actions, the Los Angeles District will ensure mitigation of future impacts, full compliance with the ESA and protection of special aquatic sites. A suggested regional condition for the NWPs that precluded all bank stabilization projects in the entire watersheds for the above creeks would unnecessarily increase our workload to review small-scale projects in areas of the watersheds that

do not have substantial cumulative impacts from bank stabilization at this time. As a result, the District's proposed regional condition would be practicable in light of its workload and would result in substantial environmental benefits to the aquatic ecosystem.

3. Consideration of Available Data: Because NWP 44 is new, historical data are not available to evaluate the potential cumulative effects of this NWP in the Los Angeles District. Review of existing RAMS data for NWP 26 authorizations issued for mining activities during the past three years indicates that approximately 5 new mining projects may be authorized under NWP 44 in an average year. This estimate is based on the number of mining projects that were authorized under NWP 26 or by individual permits that resulted in a loss of 0.5 acre or less of waters of the U.S., including wetlands. Because of the constraints already in the permit, its conditions and other regional conditions, the District estimates this could result in temporary impacts to approximately 2.0 acres of waters of the U.S., and the additional loss of approximately 2.0 acres of waters of the U.S., including wetlands. The new general conditions would provide further limitations on the use of NWP 44. Due to the above constraints, NWP 44 would result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for NWP 44, there would be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. With the inclusion of constraints on the use of NWP 44 in sensitive geographic areas and habitat types, authorization of projects under this NWP would result in long-term minor impacts to the aquatic environment.
4. Waters Excluded from NWP or Subject to Additional Notification Requirements:
 - (a) The District has identified waters that will be excluded from use of this NWP. An explanation accompanies each waterbody. These waters are:
 - (1) All jurisdictional vernal pools.
Reason for Exclusion: Substantial loss of jurisdictional vernal pool habitat has been documented in the southern California region. Loss of vernal pools ranges from 95 to more than 99 percent in the coastal counties from Santa Maria southward to Baja California and the western Riverside County area, clearly indicating substantial cumulative losses of this habitat type in these areas. In the Los Angeles Basin area, losses are almost total. Jurisdictional vernal pools are unique wetland habitat types, and provide essential habitat for several threatened or endangered invertebrate and plant species endemic to a limited number of pools. It is the position of the Los Angeles District that vernal pools in the above areas are sufficiently rare that the loss of or impact to any jurisdictional vernal pool should be significantly mitigated and/or require site specific review under the Section 404(b)(1) Guidelines and public interest review factors to fairly evaluate the impacts of the proposed activity on the physical and biological functions of the aquatic ecosystem. Without the above exclusion, NWP 44 could result in more than minimal impacts to special aquatic sites and threatened or endangered species in the Los Angeles District.
 - (2) For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in the Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no nationwide permit, except Nationwide Permits 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary Recreational Structures), 20 (Oil

Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs and riffle-and-pool complexes).

Reason for Exclusion: This regional condition provides needed constraints for discharges of dredged or fill material associated with new structures or facilities in special aquatic sites in desert regions. Special aquatic sites in the desert regions of the Los Angeles District support substantial aquatic resources that exhibit relatively high physical and biological functions. These aquatic areas provide important and unique habitat for threatened and endangered species, including least Bell's vireo and southwestern willow flycatcher, Neotropical migratory birds, and other indigenous wildlife. Past construction activities in and adjacent to these special aquatic sites have degraded portions of these high value systems. To ensure the NWP's would have minimal impacts, both individually and cumulatively, authorization by general permit for fills in special aquatic sites in the above desert regions should be precluded in the Los Angeles District. Proposals for further impacts to this valuable desert resource would be reviewed under the Individual Permit process that requires a rigorous alternatives analysis. As a result, further impacts to the special aquatic sites in the desert would be avoided and minimized to the maximum extent practicable. With this regional condition, the Los Angeles District can ensure the NWP's would have minimal impacts, both individually and cumulatively, to special aquatic sites in the desert regions of the Los Angeles District.

(3) Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses, and in ephemeral watercourses for projects with more than 0.1 acres of impact to waters of the U.S. for projects that would otherwise be considered for authorization under NWP's 39, 42, and 43.

Reason for Exclusion: According to a cumulative impact assessment for the Santa Margarita River watershed by Dr. Eric Stein (*Cumulative Impacts of Section 404 Clean Water Act permitting on the Riparian Habitat of the Santa Margarita, California Watershed*, Wetlands, Vol. 18, No. 3, September 1998, pp. 393-408), the Murrieta Creek and Temecula Creek watersheds have been adversely affected by a large number of past Section 404 permit actions, as well as additional unauthorized fills. In addition, portions of these watersheds support riparian areas that exhibit relatively high physical and biological functions. Further permanent fills in waters of the U.S. under certain NWP's would likely result in more than minimal impacts to jurisdictional areas in these watersheds on a cumulative basis. By taking discretionary authority over such actions in these two watersheds that exhibit cumulative impacts from past 404 permit actions, the Los Angeles District will ensure mitigation for future impacts, full compliance with the Endangered Species Act, and protection of special aquatic sites. Without the above exclusion, NWP 44 could result in more than minimal impacts to special aquatic sites and threatened or endangered species in the Los Angeles District.

The District originally proposed taking discretionary authority to preclude authorization by general permit for all discharges of dredged or fill material in waters of the U.S. in the

entire Santa Margarita River watershed. Although such a condition was repeatedly suggested by the resource agencies and others, the District concluded it would unnecessarily and substantially increase our workload by requiring review by individual permit of small-scale projects in areas of the watershed that do not have substantial cumulative impacts at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this suggestion would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem. Further, this suggestion would not be necessary to ensure the cumulative effects to the aquatic environment of the NWP program generally, and NWP 44 specifically, do not exceed a minimal level.

(4) San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects.

Reason for Exclusion: In San Luis Obispo Creek and Santa Rosa Creek, bank stabilization projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, large storm events scour the channel substrate causing loss of vegetation and long-term channel incision. Although bank stabilization projects have not resulted large losses of waters of the U.S., the cumulative hydrogeomorphic effects of bank stabilization projects have eliminated habitat for the threatened southern steelhead and other species that utilize these streams. At present, Los Angeles District has identified more than minimal cumulative impacts directly resulting from the use of NWPs 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank stabilization projects in these two stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated. Without the above exclusion, NWP 44 could result in more than minimal impacts to special aquatic sites and threatened or endangered species in the Los Angeles District.

A proposed regional condition that precludes all discharges in the entire San Luis Obispo Creek and Santa Rosa Creek watersheds would unnecessarily increase our workload to require review of small-scale projects in areas of the watersheds that do not exhibit substantial cumulative impacts at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

(5) Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.

Reason for Exclusion: In Gaviota Creek, Mission Creek and Carpinteria Creek, bank stabilization and grade control structure projects have resulted in more than minimal cumulative impacts to flow velocity and water surface elevations during storm events. With the augmented flow velocity, channel substrate can be scoured during large storm events causing loss of vegetation and long-term channel incision. Grade control structures effectively preclude access of reaches upstream of the structures to aquatic organisms dependent upon such access for successful reproduction. Although the bank stabilization and grade control structure projects have not resulted in large losses of waters of the U.S., the cumulative hydrogeomorphic effects of these projects have reduced the amount of habitat for the threatened southern steelhead and other species that utilize these streams. At present, there has been a cumulative adverse impact directly resulting from the use of NWPs 13, 14 and 26 in these stream channels. By taking discretionary authority over new bank

stabilization and grade control structure projects in these three stream channels, the Los Angeles District will ensure future impacts are appropriately mitigated. Without the above exclusion, NWP 44 could result in more than minimal impacts to special aquatic sites and threatened or endangered species in the Los Angeles District.

A proposed regional condition for the NWPs that precludes all bank stabilization and grade control structure projects in the entire Gaviota Creek, Mission Creek and Carpinteria Creek watersheds would unnecessarily increase our workload to require review small-scale projects in areas of the watershed that do not exhibit substantial cumulative impacts from bank stabilization at this time, or which are not likely to adversely affect the watershed on an individual or cumulative basis. Therefore, this proposed regional condition would not be practicable in light of the District's workload and would not likely result in substantial environmental benefits to the aquatic ecosystem.

- (b) The Corps requires notification for any use of NWP 44. Los Angeles District has further identified waters that will be subject to additional notification requirements for activities authorized by other NWPs. These are described in part 7 below. These requirements are superseded by the national notification requirement for NWP 44.

5. Alternatives:

- (a) No Regional Conditions: Discharges of dredged or fill material authorized under NWP 44 are limited to 0.5 acres of waters of the U.S. and notification is required. The new General Conditions have further limitations on the use of NWP 44. Due to the above restrictions, NWP 44 would result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for the proposed NWP 44, there would be more than minimal impacts in only specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions.

Without specific requirements for road crossings, there could be more than minimal impacts to southern steelhead in coastal watersheds from the Santa Monica Mountains in Los Angeles County to the San Luis Obispo/Monterey County boundary. Without a regional condition restricting use of NWP 44 in special aquatic sites in the desert regions of Los Angeles District, impacts to these relatively rare resources would continue to accrue without more thorough review. As a result, there would be more than minimal impacts, both individually and cumulatively to desert special aquatic sites in the Los Angeles District. In addition, with no regional conditions, the proposed NWP 44 could have more than minimal impacts on jurisdictional vernal pools in the Los Angeles District. Historically, there has been over a 95 percent loss of jurisdictional vernal pool habitat in the southern California area.

- (b) Alternative Regional Threshold Limits: Discharges of dredged or fill material authorized under NWP 44 are limited to 0.5 acres of waters of the U.S. and notification is required. The new General Conditions have further limitations on the use of NWP 44. Due to the above constraints, NWP 44 would generally result in minimal impacts, both individually and cumulatively, in the majority of the Los Angeles District. In the early stages of NWP program review after the publication of the 1996 Federal Register notice announcing the authorization of the new NWPs, discussions between the Corps, resource agencies and representatives of the environmental community were held to discuss means by which to further minimize the impact of the NWPs on the aquatic environment. It was noted by several participants that the new NWP 26 three-acre threshold and 1/3-acre notification

threshold were beneficial for the aquatic resources, but that they still appeared to be too great. These commenters typically expressed a recommendation that the District further restrict the applicability of the NWP by lowering the thresholds substantially lower, such as a 0.25-acre threshold. This would substantially limit impacts incurred by projects authorized to discharge dredged or fill material under NWP 26. The District believes it would also be such a low threshold that most projects would be reviewed under the individual permit process. In addition to the workload pressures this situation would bring, it does not necessarily ensure less impact to aquatic resources. Rather, it could induce more applicants to forego attempts to minimize their impacts to aquatic resources to fit an unrealistically low threshold and could result in greater impacts to aquatic resources. However, the commenters stated it would allow the public the opportunity to provide input on more projects.

In the Los Angeles District, the semi-arid climate limits special aquatic sites throughout the region. In dryland areas, lack of vegetation and developed soils result in high peak discharges for large storm events. With a predominance of deep alluvial soils, dryland systems are dominated by overland flow with groundwater recharge and throughflow only contributing a relatively small quantity to stream discharge. Over the past fifty years, agricultural and construction activities have resulted in a loss of approximately 90 percent of wetlands and 95 to more than 99 percent of the vernal pools in southern California. Further loss of special aquatic sites in southern California and Arizona could result in more than minimal cumulative impacts. To ensure any impact to special aquatic sites is offset by compensatory mitigation, the Los Angeles District would require notification for any project that impacts a special aquatic site. The Los Angeles District would eliminate the use of NWP 44 in jurisdictional vernal pools, and in special aquatic sites in Arizona and the desert regions of California. With the inclusion of the above modifications to NWP 44, the Los Angeles District would ensure minimal impacts to jurisdictional vernal pools and special aquatic sites through additional review without substantially increasing our workload. Lastly, certain watersheds and resources in the Los Angeles District support high physical and biological functions that are threatened by cumulative impacts at the watershed level. NWP 44 includes a notification requirement and the Corps would be able to ensure a project authorized under this NWP would have minimal impacts to these resources. With the inclusion of the above modifications, the Los Angeles District would ensure minimal impacts, both individually and cumulatively, for projects authorized under NWP 44.

- (c) Alternative Regional Nationwide Permit Conditions: To further ensure NWP 44 would result in only minimal impacts to the aquatic ecosystem, both individually and cumulatively, the Los Angeles District could augment the proposed notification requirements for NWP 44 by including all coastal watersheds. Alternatively, the Los Angeles District could eliminate the use of NWP 44 in all special aquatic sites. The loss of approximately 90 percent of wetland resources in southern California and the general scarcity of special aquatic sites in this semi-arid region indicates there could be a need for the review of any project which would discharge dredged or fill material in a special aquatic site under the 404(b)(1) Guidelines and the public interest factors to ensure minimal adverse impacts to special aquatic sites. However, as discussed above, NWP 44 would only impact a maximum of 0.5 acres of waters of the U.S. and have a blanket notification requirement. With the inclusion of the restrictions on NWP 44 (General Conditions and the terms and conditions for NWP 44), a regional condition which precluded all discharges in special aquatic sites would unnecessarily increase our workload to review small-scale impacts in areas that exhibit lower

physical and biological functions. As a result, this proposed modification would not be practicable and would result in relatively minor environmental benefits to the aquatic ecosystem.

In conclusion, the majority of the projects that could be authorized under NWP 44 would result in minimal impacts to the aquatic ecosystem. With the proposed modifications to NWP 44, the Los Angeles District would ensure that NWP 44 has minimal impacts on sensitive resources and watersheds with a relatively minor increase in workload.

6. Endangered Species Act (ESA):

- (a) General Considerations: Discharges of dredged or fill material authorized under NWP 44 are limited to 0.5 acres of waters of the U.S. There is a blanket notification requirement for any use of NWP 44. Furthermore, the new Regional Conditions would provide further limitations on the use of NWP 44 in certain high value wetlands and in certain watersheds. Many of these areas harbor threatened and endangered species.

In southern California, the large number of endangered species has made the general public more aware of the need to address this issue for any proposed project. General Condition 11 requires the applicant to notify the Corps if any listed species or designated critical habitat might be affected or is in the vicinity of the project. Many applicants for Department of the Army permits also contact USFWS or NMFS prior to initiating any work in waters of the U.S. General Condition 25 prohibits the use of NWP 44 in designated critical resource waters, which includes any area designated as critical habitat for any federally listed species. The District also has substantial information, including maps, previous studies and survey data, which document areas that support endangered species. The Los Angeles District is very careful to inform all prospective applicants of the need to comply with the ESA. When the District receives an application for a Department of the Army permit that involves the range of an endangered species or supports suitable habitat, the USFWS or NMFS is contacted early in the review process. If no data were available for a site, the District would also contact the USFWS or NMFS to ensure compliance with the ESA. To facilitate compliance with the ESA, the Los Angeles District has coordinated with the USFWS to complete two programmatic consultations for a number of endangered species in the Ventura/Santa Barbara/San Luis Obispo area. Overall, the number of endangered species in the Los Angeles District has required extensive coordination with USFWS and NMFS and has made the regulated public more aware of endangered species issues.

To ensure compliance with the ESA on matters related to southern steelhead, the Los Angeles District has proposed a regional condition that would require road crossings to have minimal impacts on stream channels that support the endangered steelhead. As documented above, the Los Angeles District has allocated a substantial amount of its time and resources to compliance with the ESA. With the existing procedures for compliance with the ESA and other regional restrictions, NWP 44 would be in full compliance with the Act.

- (b) Standard Local Operating Procedures for Endangered Species (SLOPES): The Los Angeles District has various procedures for ensuring compliance with the ESA. SLOPES formalize additional procedures between agencies to enable the agencies to ensure better compliance with the ESA. With the implementation of SLOPES, these procedures could be formally documented, facilitating the compliance of NWP 44 and other NWPs with the ESA. It is anticipated there will be many situations that will not be addressed by SLOPES and a case-by-case determination will be made regarding consultation with the USFWS or NMFS

pursuant to Section 7 of the ESA. The District has conducted several preliminary meetings with USFWS and NMFS staff to determine the direction of further SLOPES discussions, and additional meetings will be conducted in the near future.

7. Supplement to National Impact Analysis:

- (a) Public interest review factors (33 CFR 320.4(a)(1)): In addition to the discussion in the national decision document for this NWP, the Corps District has considered the local impacts expected to result from the regulated discharges authorized by this NWP, including the reasonably foreseeable cumulative effects of those discharges.

(1) Conservation: NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acres of waters of the U.S. and also require notification. The new General Conditions further limit NWP 44 in waters of the U.S. Because of the above restrictions, NWP 44 would result in minimal impacts to conservation, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for NWP 44, there could be more than minimal impacts in only specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. Regional conditions for NWP 44 would further preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, and in special aquatic sites in Arizona and the desert regions of California.

(2) Economics: Same as discussed in the national document.

(3) Aesthetics: Same as discussed in the national document.

(4) General environmental concerns: In the Los Angeles District, numerous threatened or endangered species require extensive coordination with USFWS and NMFS. In addition, the semi-arid environment limits the extent of aquatic resources in the southern California/Arizona area. Regional conditions for NWP 44 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, special aquatic sites and perennial watercourses and waterbodies in Arizona and the desert regions of California. With the programmatic notification requirements for NWP 44, adverse effects on general environmental concerns and sensitive resources in the Los Angeles District would be further reduced.

(5) Wetlands: In the Los Angeles District, the semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which often precludes the development of wetlands. As a result, special aquatic sites, such as wetlands, are relatively rare in the Los Angeles District and warrant more substantial protection. NWP 44 requires notification for any activity discharging dredged or fill material in any special aquatic site, including wetlands. With notification, the Corps could determine if a particular project may have more than minimal impacts and the District Engineer could invoke discretionary authority to require an individual permit for the project. With the individual permit process, comments would be requested from agencies and the interested public, and the Corps could better address potential adverse impacts to aquatic resources. In addition, the District would preclude the use of several NWPs, including NWP 44, in special aquatic sites within desert regions in southern

California and all of Arizona. With the inclusion of this modification, NWP 44 would have long-term, relatively minor impacts to wetland resources in the Los Angeles District.

(6) Historic properties: Many known and unknown historic properties and cultural resources occur in many areas of the Los Angeles District. Many of them are adjacent to watercourses or other aquatic resources, and as such, may be affected by projects proposed for authorization under NWP 44. Section 106 of the National Historic Preservation Act requires any federal action agency to determine the eligibility of any known or discovered cultural resources that may be affected by the agency's action, and to coordinate with the State Historic Preservation Officer. This is formalized at General Condition 12 which states "no activity which may affect historic properties listed, or eligible for listing, in the National Register of Historic Places is authorized, until the DE has complied with the provisions of 33 CFR Part 325, Appendix C." General condition 12 also requires notification to the Corps if a project may affect any cultural resources listed on the National Register, potentially eligible for listing on the National Register, or if the applicant has any reason to believe the resources may be eligible for listing on the National Register are known to occur on the project site. The applicant may not proceed until notified by the District Engineer that the requirements of the National Historic Preservation Act have been satisfied and that the activity is authorized. To facilitate this coordination, the Regulatory project managers access the Corps database on historical sites to determine if any known sites may be affected by a proposed project.

(7) Fish and wildlife values: NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the U.S. and requires notification. In addition, the new General Conditions further constrain the use of NWP 44 in waters of the U.S. Because of these constraints, NWP 44 would result in minimal impacts to fish and wildlife values, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions for NWP 44 would preclude discharges of dredged or fill material in jurisdictional vernal pools, and in special aquatic sites in Arizona and the desert regions of California. With the inclusion of these measures, NWP 44 would have only long-term minor impacts to fish and wildlife values in the Los Angeles District.

(8) Flood hazards: With the dynamic storm season typical of southern California and parts of Arizona, relatively large floods are a normal part of the hydrologic regime. Due to a general lack of soil development and vegetation coverage in semi-arid areas, peak discharges for very high magnitude storm events are potentially larger for dryland basins than similar-sized humid region basins. Sand-and-gravel mining operations have substantially impacted many watercourses throughout the District by removing sediment from the system which could lead to erosion downstream and headcutting upstream, resulting in an overall lowering of the river or streambed over time, direct and indirect effects on riparian resources, as well as other effects. NWP 44 will substantially limit larger mining operations' authorization under general permit unless the project applicant designs his project to effectively stay out of the existing drainages and provide alternative drainage scenarios. The additional constraints imposed by the District through regional and case-specific conditions will ensure further protection of those sensitive resources identified by the District.

(9) Floodplain values: Same as discussed in the national document.

(10) Land use: Same as discussed in the national document.

(11) Navigation: Same as discussed in the national document.

(12) Shore erosion and accretion: Same as discussed in the national document.

(13) Recreation: Same as discussed in the national document.

(14) Water supply and conservation: With the semi-arid climate and the large population in the Los Angeles District, water reclamation and groundwater recharge are important means of addressing water supply and conservation. Aggregate mining pits are frequently used for this purpose when mining has ceased. Given this, however, implementation of NWP 44 is not likely to have a substantial impact to water supply and conservation due to the relatively low impact threshold of 0.5 acre requiring most substantial mining projects in need of a 404 permit to be addressed under the individual permit process.

(15) Water quality: In the heavily populated areas of southern California and Arizona, existing water quality in most rivers is impaired by runoff from upland agricultural, residential, commercial and industrial sources. NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the U.S. and notification is required. Furthermore, the new General Conditions further limit the use of NWP 44 in waters of the U.S. Due to the above constraints, NWP 44 is expected to result in minimal adverse impacts to water quality, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions affecting implementation of NWP 44 would preclude discharges of dredged or fill material in jurisdictional vernal pools, and in special aquatic sites in Arizona and the desert regions of California.

(16) Energy needs: Same as discussed in the national document.

(17) Safety: Same as discussed in the national document.

(18) Food and fiber production: Same as discussed in the national document.

(19) Mineral needs: NWP 44 would help address local demand for aggregate material, which comprises the bulk of instream mining activities within Los Angeles District. Mining for other metalliferous ores such as gold and copper may also be facilitated by implementation of NWP 44.

(20) Considerations of property ownership: Same as discussed in the national document.

(b) 404(b)(1) Guidelines Impact Analysis (Subparts C-F):

(1) Substrate: NWP 44 could authorize projects that have short- or long-term impacts to channel substrates in the immediate vicinity of the excavation area and/or related support facilities. NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acres of waters of the U.S. and includes a blanket notification requirement. With the inclusion of the above constraints, NWP 44 is expected to result in

minimal impacts to channel substrates in most circumstances. If a particular authorized project were to remain in place for a period of years, it would have direct and indirect impacts for the life of the project. If it did not have severe adverse effects on related hydrogeomorphic and biological processes, the affected resources would be expected to recover most functions and values over the period of one to several years. To ensure minimal impacts, mitigation would have to be appropriately determined to adequately offset impacts.

(2) Suspended particulates/turbidity: In the heavily populated areas of southern California and Arizona, existing turbidity levels in most rivers have been impaired by runoff from upland agricultural, residential and industrial sources. Aggregate and hard rock/mineral mining in waters of the U.S. may exacerbate these impacts. NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acres of waters of the U.S. In addition, notification would be required for any impact to waters of the U.S., which will allow the Los Angeles District to review each project to ensure that those adverse effects are minimal. Furthermore, the new General Conditions have further limitations on the use of NWP 44 in waters of the U.S. Due to the above restrictions, NWP 44 would result in minimal adverse impacts to turbidity levels, both individually and cumulatively, in the majority of the Los Angeles District. The regional conditions for NWP 44 would preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions and in special aquatic sites in Arizona and the desert regions of California. Furthermore, the required 401 Certification would ensure minimal impacts to turbidity and suspended sediment loads in the long-term in the rivers and streams of the Los Angeles District. With the implementation of the above conditions, NWP 44 would have long-term minor impacts to turbidity levels in waters of the U.S. within the Los Angeles District.

(3) Water: Same as discussed in the national document.

(4) Current patterns and water circulation: Because NWP 44 is limited to 0.5 acres of permanent impacts to waters of the U.S., this NWP is expected to have limited applicability in Los Angeles District. Any changes to current pattern and water circulation would generally be localized at the project site and the effects would likely be attenuated within a very short distance downstream of the project site. However, depending upon the effect of the mining activity relative to the size of the river or creek, it could have much greater impacts on a local basis. The required notification would allow the District to assess the potential effects of a particular action on the aquatic environment. Therefore, NWP 44 would have relatively long-term, minor adverse impacts to current patterns and water circulation in waters of the U.S. within the Los Angeles District for most actions.

(5) Normal water level fluctuations: Same as discussed in the national document.

(6) Salinity gradients: Same as discussed in the national document.

(7) Threatened and endangered species: NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the U.S. and requires notification. The new general conditions limit further the use of NWP 44 in certain waters of the U.S., such as in designated critical habitat (general condition 25). Due to these

constraints, NWP 44 by itself is expected to result in minimal adverse impacts to threatened and endangered species, both individually and cumulatively, in the majority of the Los Angeles District. Regional conditions on NWP 44 help address projects that may have more than minimal impacts in specific geographic areas and certain habitat types that harbor listed species. The regional conditions for NWP 44 would preclude discharges of dredged or fill material in jurisdictional vernal pools in Los Angeles District, and in special aquatic sites in Arizona and the desert regions of California. In addition, given the large number of listed species in Los Angeles District, continued coordination with USFWS and NMFS is required to ensure minimal impacts to endangered species. With the continuation of the existing coordination procedures, and the development and implementation of SLOPES, NWP 44 is expected to have minimal impacts on threatened and endangered species in the Los Angeles District.

(8) Fish, crustaceans, molluscs, and other aquatic organisms in the food web: Same as discussed in the national document. Additional restrictions would also apply to jurisdictional vernal pools in specific regions and in special aquatic sites in desert regions of southern California and all of Arizona.

(9) Other wildlife: In the semi-arid southern California climate, rivers and streams and their associated riparian habitat represent a very important resource for wildlife. NWP 44 would only authorize discharges of dredged or fill material into a maximum of 0.5 acre of waters of the U.S. and it requires notification. In addition, the new general conditions have additional limits on the use of NWP 44 in certain waters of the U.S. Due to these constraints, NWP 44 would result in minimal adverse impacts to wildlife, both individually and cumulatively, in the majority of the Los Angeles District. With no regional conditions for NWP 44, there could be more than minimal impacts only in specific geographic areas and certain habitat types that exhibit relatively high physical and biological functions. The regional conditions for NWP 44 preclude discharges of dredged or fill material in jurisdictional vernal pools, and in special aquatic sites in Arizona and the desert regions of California.

(10) Special aquatic sites: The potential impacts to specific special aquatic sites are discussed below:

(a) Sanctuaries and refuges: Same as discussed in the national document.

(b) Wetlands: In the Los Angeles District, the existing semi-arid climate limits the extent and number of wetland resources. This scarcity of wetlands is especially evident in Arizona and in the desert regions of California. In these areas, annual precipitation is usually below 10 inches, which precludes the development of wetlands in the majority of these desert regions. Approximately 90 percent of wetlands in California have been affected by historic conversion to agricultural uses, grading and filling activities. As a result, wetland areas are rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to wetland resources, the Los Angeles District would prohibit use of NWP 44 in jurisdictional vernal pools, and in special aquatic sites in the desert regions of southern California and all of Arizona. With the inclusion of this modification, along with the limitations included in the March 9, 2000 Federal Register, NWP 44 would have minimal impacts to wetlands in the Los Angeles District.

(c) Mudflats: In the Los Angeles District, historic coastal development activities have greatly reduced the extent and number of mudflat resources. Approximately 90 percent of wetlands, including coastal wetlands and mudflats, in California have been affected by historic conversion to agricultural uses, grading and filling activities. Additional mudflat areas associated with lake and pond fringes, and river deltas, have also been affected by a variety of activities such as dredging to maintain deeper water for aesthetic purposes, to allow boating access and to increase circulation. As a result, mudflats are rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to mudflats, the Los Angeles District would require notification for any activity discharging dredged or fill material in any special aquatic site, including mudflats. In addition, the Los Angeles District would require notification for any discharge of dredged or fill material in Essential Fish Habitat, such as within coastal estuaries (these points are moot in the case of NWP 44 as it requires notification). The inclusion of these modifications are generally expected to benefit aquatic resources potentially affected by projects authorized under NWP, but they will also likely have minimal effect on utilization of NWP 44 because authorization discharge of dredged or fill material into tidal waters of the United States is not authorized, and it further excludes non-tidal wetlands adjacent to tidal waters.

(d) Vegetated shallows: In the Los Angeles District, historic agricultural and construction activities have reduced the extent and number of vegetated shallows. Approximately 90 percent of wetlands in California, including some vegetated shallows, have been affected by historic conversion to agricultural uses, grading, and filling activities, such as marina construction and dredging to maintain deeper open water areas for aesthetic purposes, to allow boating access and to increase circulation. As a result, vegetated shallows are rare in the Los Angeles District and warrant more rigorous protection. To ensure minimal impacts to vegetated shallows, the Los Angeles District would require notification for any activity discharging dredged or fill material in any special aquatic site, including vegetated shallows. The regional conditions for NWP 44 would also preclude discharges of dredged or fill material in jurisdictional vernal pools in specific regions, and in special aquatic sites in Arizona and the desert regions of California.

(e) Coral reefs: Not applicable.

(f) Riffle-and-pool complexes: In the semi-arid southern California and Arizona areas, limited water resources and the need for flood control have led to the construction of numerous dams in the mountains of southern California and Arizona, and on the Colorado River. With the construction of these dams, many riffle-and-pool complexes have been eliminated by the reservoirs. Furthermore, construction of a dam also modifies the hydrologic regime of the river, which can degrade downstream riffle-and-pool complexes by sediment management practices by the dam keepers, scouring events, loss of appropriate bedload material to maintain the composition, structure and location of the complexes, and other actions. Some riffle-and-pool complexes may have been affected by aggregate or hardrock mining activities. As a result, this resource is essentially confined to montane and foothill regions in the Los Angeles District. They warrant more rigorous protection due to their relatively high production of invertebrate fauna and other contributions to riparian aquatic resources such as aeration of the water, provision of substrate for decomposers, and other factors.

To ensure minimal impacts to riffle-and-pool complexes, the Los Angeles District would require notification for any activity discharging dredged or fill material in any special aquatic site, including riffle-and-pool complexes (however, this point is moot as NWP 44 requires notification). Regional conditions for discharges of dredged or fill material in jurisdictional vernal pools and in special aquatic sites in Arizona and the desert regions of California would preclude use of NWP 44 in these resource types or watersheds. With the inclusion of these modifications, NWP 44 is expected to have minimal impacts to riffle-and-pool complexes in the Los Angeles District. See also the discussion in the national document.

(11) Municipal and private water supplies: See discussion on *water supply and conservation*, above.

(12) Recreational and commercial fisheries: Same as discussed in the national document.

(13) Water-related recreation: Same as discussed in the national document.

(14) Aesthetics: Same as discussed in the national document.

(15) Parks, national and historical monuments, national seashores, wilderness areas, research sites, and similar areas: Same as discussed in the national document.

8. List of Final Corps Regional Modifications and Conditions for NWP 44: [The original public notices issued by Los Angeles District to receive comments on proposed regional conditions included two with subparagraphs for notification requirements and for discretionary authority specific to particular aquatic types or watershed areas. For the sake of ease of use, these conditions' order are further modified below to reflect a simple listing, as well as grouping several that were particularly similar.]

- (a) For coastal watersheds from the southern reach of the Santa Monica Mountains in Los Angeles County to the San Luis Obispo County/Monterey County boundary, all road crossings must employ a bridge crossing design that ensures passage and/or spawning of steelhead (*Oncorhynchus mykiss*) is not hindered in any way. In these areas, bridge designs that span the stream or river, including designs for pier- or pile-supported spans, or designs based on use of a bottomless arch culvert simulating the natural stream bed (i.e., substrate and streamflow conditions in the culvert are similar to undisturbed stream bed channel conditions) shall be employed unless it can be demonstrated the stream or river does not support resources conducive to the recovery of federally listed anadromous salmonids, including migration of adults and smolts, or rearing and spawning. This proposal also excludes approach embankments into the channel unless they are determined to have no detectable effect on steelhead.
- (b) For the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County), no nationwide permit, except Nationwide Permits 1 (Aids to Navigation), 2 (Structures in Artificial Canals), 3 (Maintenance), 4 (Fish and Wildlife Harvesting, Enhancement, and Attraction Devices and Activities), 5 (Scientific Measurement Devices), 6 (Survey Activities), 9 (Structures in Fleeting and Anchorage Areas), 10 (Mooring Buoys), 11 (Temporary

Recreational Structures), 20 (Oil Spill Cleanup), 22 (Removal of Vessels), 27 (Stream and Wetland Restoration Activities), 30 (Moist Soil Management for Wildlife), 31 (Maintenance of Existing Flood Control Projects), 32 (Completed Enforcement Actions), 35 (Maintenance Dredging of Existing Basins), 37 (Emergency Watershed Protection and Rehabilitation), and 38 (Cleanup of Hazardous and Toxic Waste), or other nationwide or regional general permits that specifically authorize maintenance of previously authorized structures or fill, can be used to authorize the discharge of dredged or fill material into a jurisdictional special aquatic site as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes).

- (c) For all projects proposed for authorization by nationwide or regional general permits where prior notification to the District Engineer is required, applicants must provide color photographs or color photocopies of the project area taken from representative points documented on a site map. Pre-project photographs and the site map would be provided with the permit application. Photographs should represent conditions typical or indicative of the resources before impacts.
 - (d) Notification pursuant to general condition 13 shall be required for projects in all special aquatic sites as defined at 40 CFR Part 230.40-45 (sanctuaries and refuges, wetlands, mudflats, vegetated shallows, coral reefs, and riffle-and-pool complexes), and in all perennial watercourses or waterbodies in the State of Arizona and the Mojave and Sonoran (Colorado) desert regions of California in Los Angeles District (generally north and east of the San Gabriel, San Bernardino, San Jacinto, and Santa Rosa mountain ranges, and south of Little Lake, Inyo County).
 - (e) Notification pursuant to general condition 13 shall be required for projects in all areas designated as Essential Fish Habitat by the Pacific Fishery Management Council (i.e., all tidally influenced areas).
 - (f) Notification pursuant to general condition 13 shall be required for projects in all watersheds in the Santa Monica Mountains in Los Angeles and Ventura counties bounded by Calleguas Creek on the west, by Highway 101 on the north and east, and by Sunset Boulevard and Pacific Ocean on the south.
 - (g) Individual permits shall be required in all jurisdictional vernal pools.
 - (h) Individual permits shall be required in Murrieta Creek and Temecula Creek watersheds in Riverside County for new permanent fills in perennial and intermittent watercourses otherwise authorized under NWPs 39, 42 and 43, and in ephemeral watercourses for these NWPs for projects that impact greater than 0.1 acre.
 - (i) Individual permits shall be required in San Luis Obispo Creek and Santa Rosa Creek in San Luis Obispo County for bank stabilization projects, and in Gaviota Creek, Mission Creek and Carpinteria Creek in Santa Barbara County for bank stabilization projects and grade control structures.
9. NWP 44 was issued without a 401 Water Quality Certification or a Coastal Zone Management Act Consistency Determination. As a result, each NWP 44 application would require review and

approval from the Regional Water Quality Control Board and, if the project is in the Coastal Zone or it may affect Coastal Zone resources, the California Coastal Commission before the Corps could authorize any discharges of dredged or fill material (see 33 CFR Part 330.9 and 330.10).

10. Cumulative Impacts: The cumulative impacts of this NWP on the aquatic environment are dependent upon the number of times the NWP is used within the Los Angeles District and the quantity and quality of waters of the U.S. lost due to the activities authorized by this NWP. Based on an analysis of the types of activities authorized by the District during the previous three years, the District estimates that this NWP will be used approximately five times per year, resulting in temporary impacts to approximately 2.0 acres and the loss of approximately 2.0 acres of waters of the U.S., including wetlands. This estimate is based on the number of mining projects that were authorized under NWP 26 (or by individual permits) that resulted in a loss of 0.5 acre or less of waters of the U.S., including wetlands. To ensure these activities result in minimal adverse effects on the aquatic environment, individually and cumulatively, the District estimates approximately 6.0 acres of compensatory mitigation will be required to offset the authorized losses of waters of the U.S. and ensure the NWP authorizes only activities with minimal individual and cumulative adverse effects on the aquatic environment.

In the Los Angeles District, the majority of mining projects that impact waters of the U.S. exceed 0.5 acre. For those that are within the 0.5-acre threshold, the bulk of the mining disturbance occurs in upland areas and only access roads or small diversion structures are required within waters. Although the implementation of NWP 44 may allow mining in areas below headwaters where NWP 26 would not have applied, the 0.5-acre impact threshold would limit the availability of NWP 44 in those areas. Because of local restrictions on the depths and slopes of pit mines, most aggregate mining operations within waters of the U.S. require larger areas to extract sufficient quantities of material to sustain a viable operation. Smaller operations may be able to limit impacts to this threshold. However, these would tend to have minimal impacts. Conversely, areas such as desert wetlands, which contain relatively high value resources in a confined area, could sustain greater than minimal impacts from mining activities even at the 0.5-acre threshold. For this reason, the Los Angeles District is including a regional condition that would prohibit use of NWP 44 in wetlands in the desert regions of southern California and in all of Arizona.

The terms and conditions of the NWP, including the preconstruction notification requirements and the regional conditions listed in Section 7 of this document, will ensure this NWP authorizes only activities with minimal and cumulative adverse effects on the aquatic environment. High value waters will be protected by the restrictions in General Condition 25, the regional conditions discussed above, and the preconstruction notification requirements of the NWP. Through the preconstruction notification process, the DISTRICT will review certain activities on a case-by-case basis to ensure those activities result in minimal adverse effects on the aquatic environment, individually and cumulatively. Because of this review, the District Engineer can add special conditions to the NWP authorization on a case-by-case basis to ensure the activity results in only minimal adverse effects on the aquatic environment, individually and cumulatively.

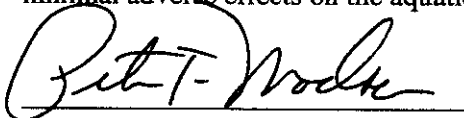
During the preconstruction notification process, the District Engineer may also exercise discretionary authority and require an individual permit for those activities that may result in more than minimal individual and cumulative adverse effects on the aquatic environment.

If, at a later time, there is clear, unequivocal evidence that the NWP would result in more than minimal adverse effects on the aquatic environment, individually or cumulatively, the modification, suspension, or revocation procedures at 33 CFR 330.4(e) or 33 CFR 330.5 will be used.

11. Settlement Agreement: On October 8, 1999, a court order (as clarified on November 10, 1999) was entered by the United States District Court (Court) for the District of Arizona that enjoined the Corps of Engineers (Corps) from authorizing projects under nationwide permits ("NWP") 13, 14, or 26 within the range of the endangered cactus ferruginous pygmy-owl (*Glaucidium brasilianum cactorum*) until a Court ordered "regionally based, programmatic impact analysis" has been completed. On March 9, 2000, at the national level, the Corps announced that as replacement permits ("Replacement Permits") it was modifying six NWPs (NWPs 3, 7, 12, 14, 27, and 40) and issuing five new NWPs (NWPs 39, 41, 42, 43, and 44) to replace NWP 26. To resolve the legal question of whether or not the October 8, 1999 court order applies to the Replacement Permits the Court approved a settlement agreement ("Settlement Agreement") executed on September 22, 2000 by Center for Biological Diversity and Defenders of Wildlife (Plaintiffs) and the Corps (Defendants).

In the Settlement Agreement, the Corps agreed to satisfy certain conditions prior to making the Replacement Permits effective within the geographic area subject to the injunction in Defenders of Wildlife v. Ballard, No. CV-97-794-TUC-ACM (D. Ariz.). One condition was that the Corps agreed to solicit comments on the environmental documentation for the replacement permits and regional conditions for 45 days and delay for an additional 45 days making the replacement permits effective within the geographic area of the injunction. The Corps will give full and due consideration to these comments and will modify the replacement permits or regional conditions as necessary to ensure compliance with all federal laws. Therefore, within the geographic scope of the injunction, which includes portions of Pima and Pinal Counties in Arizona, the Corps will not use the Replacement Permits and will not require compliance with the new regional conditions for the all other non-Replacement Permits NWPs until this condition is satisfied. When the necessary conditions of the Settlement Agreement have been satisfied, the Corps will announce an effective date for the Replacement Permits and the regional conditions within the geographic area covered by the Settlement Agreement.

12. Final Determination: Based on the considerations discussed above, and in accordance with 33 CFR 330.4(e)(1) and 330.5(c), I have determined that this NWP, including its terms and conditions, all regional conditions, and limitations, will authorize only those activities with minimal adverse effects on the aquatic environment, individually or cumulatively.



PETER T. MADSEN
BG, DIVISION ENGINEER
SOUTH PACIFIC DIVISION

22 May 01
DATE